United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To Be Argued By
David M. Brodsky

76-6139

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Appeal Docket No. 76-6139

JAMES F. REGAN,

Plaintiff-Appellant

-against-

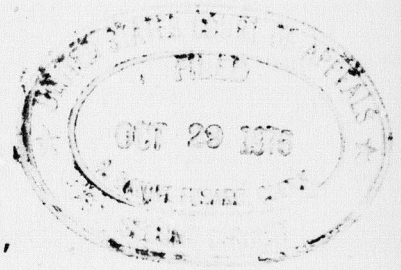
JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND, FRANCIS R. JULES, and DONALD J. GRATTAN,

Defendants-Appellees

and

JOHN CALLAGHAN, individually and as a member of The New York City Police Department, JAMES M. HARKINS, individually and as a member of The New York City Police Department and HOWARD GREENWALD, individually and a a member of The New York City Police Department,

Defendants



On Appeal from the United States District Court For the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff-appellant James F. Regan (hereinafter "plaintiff") appeals from a Memorandum and Order entered August 2, 1976 (A-61), by the Honorable Edward R. Neaher, United States District Court for the Eastern District of New York (reported at 417 F. Supp. 399), dismissing plaintiff's Amended Complaint alleging Bivens-type and other claims against four federal law enforcement officers (the "federal defendants") (appellants herein) on the grounds,

inter alia, that they were time-barred by the New York one-year statute of limitations governing official acts by constables, sheriffs, and coroners, CPLR § 215(1). Plaintiffs' claims arising under 42 U.S.C. 1983 against three New York City policemen (the "city defendants") for the same conduct still remain in the case and are being prosecuted in the lower court. The Order appealed from was certified pursuant to Rule 54(b), Federal Rules of Civil Procedure, as a final order by Judge Neaher.

Specifically, Judge Neaher's Memorandum and Order held that:

1) Plaintiff's Fourth Amendment claims under Bivens against the federal defendants were time-barred by the application of the New York one-year statute of limitations pursuant to CPLR § 215(1);

2) Plaintiff's state law claims against the federal defendants were time-barred by the application of the New York one-year statute of limitations pursuant to § 215(3); and

3) Plaintiff's Amended Complaint failed to state a cause of action against the federal defendants under 42 U.S.C. § 1985.

Plaintiff moved for reargument pursuant to Rule 59(e), F.R.Civ.P., before the lower court solely on the question of whether plaintiff's Fourth Amendment claims under Bivens were time-barred by the New York statute of limitations, CPLR 215(1). Prior to the determination of plaintiff's motion, plaintiff filed his Notice of Appeal from the entire August 2 Order. Subsequently, on September 24, 1976, Judge Neaher entered a Memorandum Order (A-87)

denying plaintiff's motion for reargument. No new Notice of Appeal was filed from this Order since the original Notice was sufficient to bring all relevant issues before the Court.

STATEMENT OF THE FACTS AND SUMMARY OF PROCEEDINGS

On the evening of November 12, 1973, an armed robbery took place at a warehouse in the vicinity of John F. Kennedy International Airport, Queens, New York.

Three days later, on November 15, 1973, plaintiff James Regan was seized, admittedly without a search or arrest warrant by the federal and city defendants (A-38), at his place of employment, Seaboard World Airlines, where plaintiff was and continues to be employed as a cargo handler. Plaintiff was searched, arrested and detained from approximately 6:00 P.M. until the next morning. In addition, plaintiff's car and locker were searched (A-25). Plaintiff was interrogated by the defendants at Seaboard, later at the FBI headquarters at Kennedy Airport and still later at a local Queens police precinct. Plaintiff was interrogated for several hours before being advised of his constitutional rights or the charges against him (A-5).

After being interrogated, plaintiff was detained overnight in the Federal House of Detention and arraigned the next morning before a United States Magistrate in the United States District Court for the Eastern District of New York

on a criminal complaint authorized by Assistant U.S. Attorney Edward Boyd. He was charged with willful and unlawful participation in an armed robbery in which merchandise moving in foreign commerce, having a value of more than $100, was stolen in violation of the laws of the United States (A-31). Plaintiff was and has been represented since the arraignment by present counsel (A-76). On November 27, 1973, upon motion by the United States Attorney, the criminal complaint was dismissed (A-31).

Counsel for the plaintiff were thereafter informed that, notwithstanding the dismissal of the complaint, the United States had an eyewitness identification of plaintiff's criminal conduct* and the United States would "get" the plaintiff (A-77).

Thereafter, counsel for plaintiff determined that the investigation of plaintiff had not ended. Plaintiff and his family continued to be surveilled by the defendants. On March 15, 1974, plaintiff's counsel submitted affidavits to the United States attempting to prove that plaintiff was at his place of employment at the time of the robbery and was not guilty of any crime. At that time, plaintiff's counsel was informed that plaintiff continued to be under investigation (A-78). Periodically thereafter, plaintiff's counsel

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* In fact, plaintiff's deposition of one city defendant, Sgt. Harkins, revealed that plaintiff's arrest was based upon an identification of a voice believed similar to plaintiff's.

unsuccessfully attempted to determine from the United States whether their investigation of plaintiff had ended. At no time was plaintiff's counsel informed as to the basis for the original arrest other than by reference to the alleged "eyewitness" whose identity was not revealed.*

Because plaintiff continued to be in jeopardy of being indicted (A-78), he did not commence any action until January 29, 1975, when this action for money damages was commenced pursuant to 28 U.S.C. §§ 1331 and 1343 against the United States, The City of New York, Joseph F. Sullivan, Special Agent of the Federal Bureau of Investigation, certain known and unknown law enforcement officers, and Edward Boyd, the Assistant United States Attorney who authorized the criminal complaint. Plaintiff alleges violations of 42 U.S.C. §§ 1983 and 1985, and of the Fourth, Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution, arising out of the arrest, search, detention, and interrogation of plaintiff without probable cause. Plaintiff also charged the same defendants in pendent state law claims with false arrest, defamation, and other state law claims.

Following disclosure through interrogatories of the

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* Despite demands duly made by plaintiff's counsel pursuant to the discovery procedures in the Federal Rules, the United States Attorney has repeatedly refused to supply the information to plaintiff's counsel which allegedly formed the basis for probable cause to search, arrest, and interrogate plaintiff on the ground that the investigation the armed robbery is still continuing (A-79).

true identities of the fictitious parties named in the complaint, plaintiff, with approval of the Court by Order dated October 24, 1975, filed an Amended Complaint on November 6, 1975, which substituted Special Agents of the Federal Bureau of Investigation, George Van Nostrand and Francis Jules, for John Doe #1 and #2, and New York City policemen John Callaghan and James M. Harkins, Donald J. Grattan and New York City Police Lieutenant Howard Greenwald as party defendants.

By Memorandum and Order dated April 30, 1976, Judge Neaher, on motion by the federal defendants for summary judgment, dismissed the action against the United States, Edward Boyd, individually and in his official capacity, and against defendants Sullivan, Van Nostrand, Jules, and Grattan in their official capacities only. In so dismissing, Judge Neaher held that the Amended Complaint stated a claim for relief under Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 388 (1971) (A-56).

Subsequent to the Court's April 30 Order, the remaining federal defendants (appellants herein) answered plaintiff's Amended Complaint, denying the material allegations contained therein and asserting certain affirmative defenses which are not pertinent to this appeal. Thereafter, the federal defendants filed an Amended Answer (A-37), and added for the first time, after a year and one-half of litigation, a statute of limitations defense. The federal defendants then moved for judgment on the pleadings seeking

dismissal of plaintiff's action on the grounds that the Fourth Amendment Bivens claims and the pendent claims were time-barred, and that the § 1985 claim failed to state a claim upon which relief can be granted. As stated above, the lower court granted federal defendants' motion and the instant appeal was taken.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in deciding that a narrow one-year statute of limitations for state actions against constables, sheriffs, and coroners was the most appropriate limitations period for a broad and wide-ranging federal cause of action arising directly from the Constitution of the United States?

2. Did the District Court's application of the one-year State limitations period unfairly and unconstitutionally discriminate against the federally created and Constitutionally-based right as a matter of law, and alternatively, under the circumstances of this case?

3. Did the District Court err in failing to apply a federal tolling period for the Bivens claims during the period of time when defendants refused to disclose the basis of probable cause for his arrest?

4. Did the District Court err in refusing to apply the New York three-year statute of limitations through the fashioning of a special federal limitations period for the Constitutionally-based cause of action which would be the same as the state limitations period applicable to a claim arising under 42 U.S.C. § 1983?

5. Did the District Court err in refusing to fashion a special two-year federal limitations period for a Bivens claim as a counterpart to the two-year limitations

period under the Federal Tort Claims Act, 28 U.S.C. § 2401(b)?

6. Did the District Court err in holding that, for purposes of applying a state limitations period, a Bivens claim arising under the Federal Constitution was not equivalent to a suit based upon a liability arising under a "statute"?

7. Did the District Court err in failing to apply a six-year State limitations period for causes of action for which no limitation period has been prescribed?

8. Did the District Court err in dismissing plaintiff's claim for defamation of character as barred by the one-year New York statute of limitations?

9. Did the District Court err in dismissing plaintiff's § 1985 claim for failure to allege a racial or class-based discriminatory animus?

Plaintiff-appellant urges that each of the questions be answered in the afirmative.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN APPLYING THE NEW YORK ONE-YEAR STATUTE OF LIMITATIONS PURSUANT TO CPLR § 215(1) TO A CONSTITUTIONALLY-BASED CAUSE OF ACTION

A. Introduction

This case presents a unique question of first impression for this Court involving an important issue under federal law. Plaintiff has sued the federal defendants for deprivation of his Constitutional rights arising directly from the Fourth Amendment as recognized by the Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). However, the Supreme Court in Bivens did not prescribe a statute of limitations to apply in subsequent Bivens-type actions, leaving this question open for judicial determination. Under these circumstances, federal courts apply either the most analagous state limitations period, see Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975); U.A.W. v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), or, where no state limitations period is comparable and where special federal considerations are present, a special federal limitations period, Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); Holmberg v. Armbrecht, 327 U.S. 392 (1946); and McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).

Plaintiff brought this action approximately one year and two months after the date he was illegally searched, arrested and detained.*

The lower court dismissed the plaintiff's Amended Complaint against the federal defendants as time-barred by the New York one-year statute of limitations pursuant to CPLR § 215(1), which states in pertinent part as follows:

> "The following actions shall be commenced within one year:
>
> 1. an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except the non-payment of money collected upon an execution."

The lower court erred in applying the one-year statute by disregarding the broad nature of plaintiff's Bivens claims as well as significant legal authority supporting plaintiff's argument that his Bivens claims were timely brought. A reading of the lower court's opinion reveals no legal precedent for the application of CPLR § 215(1) but rather is based upon a series of ill-founded assumptions and poorly reasoned conclusions.

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* The question of exactly when the Bivens-type cause of action accrued is also presented here. The Court below held it accrued either on the date of arrest or on the date the criminal complaint was dismissed. However, plaintiff-appellant argued below -- and raises the issue again on appeal -- that the statute of limitations was tolled during the pendency of the active criminal investigation of him. See Point I(E), infra.

As plaintiff demonstrates below, the lower court's decision should be reversed and the Amended Complaint reinstated against the federal defendants.

B. CPLR § 215(1) is not the most analogous state statute of limitations for a Bivens claim.

The primary basis for the claim against the federal defendants is the Fourth Amendment to the United States Constitution.* A right to bring suit under the Fourth Amendment was specifically recognized by the Supreme Court in Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, supra. The Fourth Amendment, as the Court was quick to note,

> "is not tied to the niceties of local trespass laws . . ." (403 U.S. at 393-4),

nor is it tied to

> "whether the State in whose jurisdiction [federal] power is exercised would prohibit or penalize the individual act. . . . The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." (403 U.S. at 392, 394).

* Plaintiff asserts claims for violations of the Fifth, Sixth, Ninth, and Fourteenth Amendments. These violations all stem from the same events surrounding plaintiff's claimed violation of his Fourth Amendment rights. The reasoning of Bivens extends as well to violations of other constitutional rights. See generally Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev. 1532 (1972). Cf. Brault v. Town of Milton, 527 F.2d 730 (2nd Cir. 1975), rehearing en banc, 527 F.2d 736 (2d Cir. 1975), Lombard v. Board of Education of The City of New York, 407 F. Supp. 116 (E.D.N.Y. 1976); Fine v. The City of New York, 529 F.2d 70 (2d Cir. 1975); Edgarton v. Puckett, 391 F. Supp. 463, 466 n. 3 (N.D.Va. 1975); Gordon v. City of Warren, 415 F. Supp. 556 (E.D.Minn. 1967). The statute of limitations for such violations should be the same as for plaintiff's Bivens claims.

Thus, the Court has made clear that fixed comparisons to state remedies are inappropriate; almost by definition, there can be no comparable state remedy for a Constitutionally-based cause of action.*

Yet the lower court, in looking to a New York State statute of limitations period, applied an old and rarely invoked limitations period of one year for actions against a "sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty . . ." CPLR § 215(1).

This statute is not the most analogous limitations period for several reasons. First, on its face, the section refers to constables, sheriffs, and coroners, none of whom are involved here. Even if the section were construed to involve others beyond those named, the section should not be read to include federal officers. This Circuit has, in actions under 42 U.S.C. § 1983** against state or city law enforcement personnel, who are more analogous to constables and sheriffs than are the federal agents here, consistently held that the

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* The lower court recognized that the Bivens action was not comparable to state intentional torts and rejected the one-year state limitations period for intentional torts, CPLR § 215(3), urged by the federal defendants and recently adopted in the poorly-reasoned case of Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y. 1975), relied on by the federal defendants below.

** 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunitities secured by the Constitution and laws, shall be liable to the party injured in an action at law, . . ."

three-year statute under CPLR § 214(2) applies,* and implicitly rejected the one-year statute under CPLR § 215(1). Swan v. Board of Higher Education of The City of New York, 319 F.2d 56 (2d Cir. 1963); Romer v.Leary, 425 F.2d 186 (2d Cir. 1970); Ortiz v. LaVallee, 442 F.2d 912 (2d Cir. 1971); Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974). See also Beyer v. Werner, 299 F. Supp. 967, 969 (E.D.N.Y. 1969).

Secondly, the lower court also violated the doctrine of the law of the case, see Beecher v. Leavenworth, 209 F.2d 20 (9th Cir. 1954), by applying CPLR 215(1), which refers to acts performed in the officers' "official capacity." Despite plaintiff's argument in the past, which he continues to adhere to, that the federal defendants acted in their official capacities in depriving him of his constitutional rights, the lower court expressly rejected that view and dismissed the suit against the federal defendants in their official capacities on defendant's earlier motion for summary judgment. Memorandum and Order, April 30, 1976 (A-41). It was completely inconsistent for the lower court thereafter to apply CPLR 215(1) as the most analogous statute of limitations period. Ironically, the lower court acknowledged the contradiction in his two rulings but concluded that his rulings were "constrained by authority." We respectfully submit that the lower court simply erred in its decision in applying 215(1) to the facts here.

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* See text of CPLR 214(2), infra at Point III.

Thirdly, the lower court disregarded the thrust of this Court's ruling in Bivens on remand. Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). The Court held that federal officers, like state officers under 42 U.S.C. § 1983, had no immunity from suit, relying in part on the "incongruity", "confus[ion]" and "absurdity" which would exist if "under one phase of federal law a police officer had immunity and . . . under another phase of federal law he had no immunity." Bivens v. Six Unknown Named Agents, supra at 1346-7. Thus, this Court implicitly found that actions against federal officers should stand on the same footing as actions under Section 1983 against state officers.

The same incongruity, confusion, and absurdity now exists in this action if the police defendants have a three-year statute of limitations but the federal defendants had a one-year limitations period. Accordingly, the lower court erred in failing to apply the longer three-year statute which is applicable to § 1983 actions.

C. The application of the one-year statute unfairly discriminates against plaintiff as a matter of law.

The lower court ruled that before the one-year statute of limitations provision can be applied, it must be ascertained whether it discriminates against, or unfairly handicaps the assertion of, a cause of action arising under federal law (A-69). See Sola Electric Co.v. Jefferson Electric Co., 317 U.S. 173, 176 (1942); James Stewart & Co. v. Sadrakula, 309

U.S. 94 (1940); Caldwell v. Alabama Dry Dock Shipbuilding Co., 161 F.2d 83 (5th Cir.), cert. denied, 332 U.S. 759 (1947).

However, the lower court greviously erred in applying this important doctrine, holding that "no good policy reason [exists] for allowing a plaintiff claimed to be required by . . . law enforcement action to have more than one year in which to discover whether his constitutional rights were violated" (A-69). The simple fact is that this Court -- and others which have considered the question, see Almond v. Kent, 459 F.2d 200 (4th Cir. 1972); Van Horn v. Lukhard, 392 F. Supp. 384 (E.D.Va. 1975) -- has concluded that the assertion of federal constitutional rights under § 1983 cannot be foreclosed by a one-year state statute, and that such a short period "defeats and vitiates" the constitutional rights being asserted. Van Horn v. Lukhard, supra at 390.

The discrimination is even more invidious here since plaintiff's action, based upon a constitutional right, is afforded less protection than his action based upon a statutory right, and the causes of action -- both constitutional and legislative -- flow from the same set of facts.

In general, the courts have reacted strongly to prejudicial application of state laws to federal claims. In James Stewart & Co. v. Sadrakula, supra at 103-104, the Supreme Court stated:

> "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

Accord, Republic Pictures Corp. v. Kappler, 151 F.2d 543 (8th Cir. 1945), aff'd per curiam, 327 U.S. 757 (1946). See also Campbell v. Haverhill, 155 U.S. 610 (1895).

Furthermore, in cases arising under § 1983, the courts have consistently rejected short statutes of limitations in favor of longer limitations periods. In Barrett v. Wichael, 387 F. Supp. 1263 (S.D.Iowa 1974), a § 1983 action against a sheriff, mayor and chief of police for deprivation of plaintiff's constitutional rights, the court referred to Bivens claims and rejected the application of the Iowa two-year statute of limitations in favor of the five-year statute on the grounds that the two-year statute "unnecessarily restricts what was meant to be a broad federal remedy . . ."

In Van Horn v. Lukhard, supra, the court found that the application of a Virginia one-year statute of limitations for § 1983 actions was unconstitutional by "substantially burdening the assertion of paramount federal rights in the federal court and unreasonably discriminating against the maintenance of § 1983 constitutional tort actions." Id. at 388. Judge Merhige reasoned that:

> "Requiring civil rights plaintiffs to assert their claims within one year, or else lose all prospect of vindication, defeats and vitiates the congressional purpose in enacting a right of action which has been variously described as comprehensive, remedial, overflowing, broadsweeping, expansive, and more important than corresponding state tort rights of action." Id. at 390.

Accord, Brown v. Blake & Bane, 409 F. Supp. 1246, 1248 (E.D.Va. 1976); Bulls v. Holmes, 403 F.Supp. 475 (E.D.Va. 1975); Edgarton v. Puckett, 391 F. Supp. 463 (W.D.Va. 1975).

In Almond v. Kent, supra at 204, the court found that a § 1983 action more properly belonged at the two-year, rather than one-year, step in Virginia's statute of limitations scale of values.

The reasoning applied to § 1983 claims, cited above, is equally applicable to Bivens claims here. In fact, there is an even greater injustice done by the application of the New York one-year statute to plaintiff's Bivens claims since, as discussed above, the corresponding § 1983 claims, which arise in the very same action, enjoy the protection of the New York three-year statute of limitations period. In arriving at this anomalous position, the lower court clearly failed to seriously take into account the broad constitutional purposes envisioned in Bivens and erroneously applied the one-year statute of limitations of CPLR 215(1).

D. The application of the one-year statute was discriminatory under the specific facts of this case.

The lower court concluded that CPLR 215(1) does not discriminate against plaintiff because, in an ordinary "arrest situation", the arrested person is brought with some speed before a judicial officer, so that one year is suffi-

cient to discover whether his constitutional rights were violated (A-69). However, as pointed out to the lower court by plaintiff, this was -- and is -- just not the case here. Normally, an arrested person has the opportunity by a judicial resolution of the criminal process to determine the existence of probable cause. Here, that opportunity was taken away by defendants, thus creating the unique situation where plaintiff was totally ignorant of the basis for his arrest, and has been systematically deprived of the essential facts to determine probable cause; even as of this moment the federal defendants have withheld the essential documents which should disclose the circumstances surrounding plaintiff's arrest, and the alleged basis of probable cause.*

After first arresting plaintiff, then dismissing the complaint, then investigating him and threatening him with an indictment, and surveilling him and his family, plaintiff had, contrary to the lower court's opinion, no ability to "discover whether his constitutional rights were

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* On June 23, 1976, at a deposition of a city defendant, plaintiff's counsel finally discovered for the first time the presently alleged basis of probable cause by the city defendants, viz., the identification of a voice similar to plaintiff's. However, it is clear that the federal defendants have far greater knowlege of the significant events involved. More importantly, the United States Attorney had repeatedly refused to supply this information to plaintiff or his counsel although it was duly demanded (A-79).

Counsel have been advised recently that the reason documents are being withheld is that the investigation of the robbery is continuing. (A-79)

violated" (A-69) within the year following the date of his arrest (November 15, 1973) or the date of the dismissal of the criminal complaint against him (November 27, 1973).

The circumstances surrounding this case dictate that at the very least the three-year New York statute applies because of the discriminatory effect of the application of the one-year statute.

E. Alternatively, Under a Federal Tolling Provision The Action Would Not Be Time-Barred.

If the Court finds that a one-year statute is appropriate in the Bivens action, the Court should fashion a federal tolling provision which would toll the applicable statute of limitations until the date the basis for probable cause for the arrest is disclosed by the Government to the claimant (without the compulsion of a civil suit being brought). This tolling period will give the claimant an adequate opportunity to determine whether he has a valid Bivens action. Such a rule is consistent with well-established law which provides that the question of when a claim for relief accrued is a question of federal law. Kaiser v. Cahn, supra. Thus, tolling of a state statute of limitations applied to a federally-created right is also governed by federal law. Lukenas v. Bryce's Mountain Resort Inc., 538 F.2d 594 (4th Cir. 1976).

In Lukenas v. Bryce's Mountain Resort, Inc., supra at 597, a federal securities case, the court held that in

order for a federal toll on the state limitations period to be effected, the plaintiff must show that he exercised due diligence to discover his cause of action prior to the running of the statute, and that the defendant undertook some affirmative act of fraudulent concealment which frustrated discovery notwithstanding his diligence.*

It is clear from the undisputed facts of this case that both these criteria have been satisfied by plaintiff. Plaintiff has been extremely diligent in seeking to discover the alleged basis of probable cause for his arrest (A-77). At the same time the defendants have continually over the last three years taken affirmative steps to entirely thwart plaintiff's diligent efforts.

Accordingly, under this test the one-year statute of limitations would be tolled even up to this moment, and plaintiff's action would not be time-barred.

POINT II

A SPECIAL FEDERAL LIMITATIONS PERIOD SHOULD BE FASHIONED

A. The Court Should Apply the Same Limitations Period as in a Section 1983 Action

As demonstrated above, the one-year statute of limi-

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* The Lukenas court relied in large part on a series of fraud cases in asserting the fraudulent concealment requirement. While the phrase "fraudulent concealment" was used by the court, such a requirement is inappropriate in a "non-fraud" case, such as the one at bar. Defendants' affirmative acts in resisting disclosure should qualify herein. This interpretation is supported by the thrust of the cases cited in n. 15 in Lukenas.

tations, CPLR § 215(1), is not the most appropriate limitations period for a Bivens claim.

In a case of first impression, as here, there is every reason for this Court to choose a three-year limitations period by fashioning a federal common law limitations period which would be uniform with the statutory period governing § 1983 actions as applied by each state.

Even the lower court seemed to entertain the argument that a special limitations period should be fashioned here (A-65). At first describing the argument as "appealing," the Court then erroneously concluded that the argument "encounters an insuperable practical obstacle -- no uniformity could in fact result." (A-65).

The lower court's contention that the only kind of uniformity which is desirable is "nation-wide" and that "state by state uniformity for two similar federal causes of action" is unsatisfactory is a dramatic misinterpretation of the federal system. So long as Congress does not enact a specific statute of limitations for a federal right of action, federal courts, within each state, apply the same state limitations period for similar federal causes of action, even though such limitations periods may vary from state to state for such federal causes of action. For example, Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q) and Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j) confer independent causes of action and permit suits

against conceivably different persons, e.g. "sellers" and "buyers". Nevertheless, since they are similar in substance, in New York the same six-year statute of limitations is applied to both. See Klein v. Spear, Leeds & Kellog, 306 F. Supp. 743, 748 (S.D.N.Y. 1969) (see also authorities cited therein at n.4). However, in other jurisdictions other statutes of limitations, including three-year statutes, Trussel v. United Underwriters, Ltd., 228 F. Supp. 757, 775-776 (D. Colo. 1964); and four-year statutes, Connelly v. Balkwill, 174 F. Supp. 49, 63-64 (N.D.Ohio 1959), aff'd per curiam 279 F.2d 685 (6th Cir. 1960), are applied to similar causes of action asserted under § 10(b) and § 17(a).

Moreover, within this Circuit, uniformity between a § 1983 claim and a Bivens claim has been upheld.* In Ervin v. Lanier, 404 F. Supp. 15, 20 (E.D.N.Y. 1975), Judge Platt stated that "the [New York] three-year period is more

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* Indeed, in an earlier phase of this action, the lower court here indicated that the Bivens claims and § 1983 claims should be treated similarly. In ruling on the federal defendants' motion to dismiss the Bivens claims against them in their official capacities, the Court held:

> "For the same reasons that damage awards in actions under 42 U.S.C. § 1983 must be framed to run against defendants only in their individual capacities [cases omitted], and that defendants may be sued only individually [case omitted], federal defendants' motion for summary judgment dismissing the claims brought against them in their official capacities, in this action for damages founded upon the Constitution, is granted." Memorandum and Order, April 30, 1976. (A-52-53).

appropriate [than the one-year period under CPLR § 215] even though a Bivens action is not technically based on a liability created by a statute (Emphasis in original)."

Plaintiff cited Ervin below but the lower court rejected its authority, claiming that since the plaintiffs' claims were barred by either a one-year or three-year statute the portion quoted is dicta. Whether or not Judge Platt's statement is dicta, the reasoning behind it is persuasive and should have been followed below.

In an unreported decision, Lepiscopo v. F.B.I., Civil Action No. 1170-72 (D.N.J. November 13, 1972), a copy of which is attached hereto as Exhibit A, Judge Garth held that, in a Bivens action, since "there is no readily identifiable statute of limitations for a federally created cause of action at law, we should analogize to similar causes of action for which there is a statute of limitations. I find the Bivens action very similar to action under 42 U.S.C. § 1983 . . ." Accordingly, the Court applied the same New Jersey statute as prior decisions had held should be applied to § 1983 actions.

Furthermore, in Gordon v. City of Warren, 415 F. Supp. 556 (E.D.Mich. 1976), the district court specifically held that where a constitutional claim (there, a Fourteenth Amendment claim) is "juxtaposed with § 1983 and § 1985 actions where all three counts are premised on the same underlying facts, [the] Court believes it would be inconsistent to apply

a statute of limitations for the first count different from that applied to the latter two counts," Gordon v. City of Warren, supra at 561. Accordingly, the court applied to the constitutional claim the same statute of limitations applicable to § 1983 claims in Michigan.

Likewise, in Lombard v. Board of Education of The City of New York, 407 F. Supp. 1116, 1170 (E.D.N.Y. 1976), the Court held that plaintiff stated valid claims under either § 1983 or § 1331, arising out of the First and Fourteenth Amendments. The court then applied the New York three-year statute of limitations to plaintiff's claims. The effect of the court's decision was to treat the § 1331 constitutional claims in the same manner as the § 1983 claims, insofar as a limitations period was concerned.

Accordingly, the lower court erred in refusing to apply a three-year limitations period to plaintiff's Bivens claims.

B. Alternatively, the court should apply a two-year limitations period based upon the Federal Tort Claims Act

The Court could also create a federal statute of limitations under the authority of McAllister v. Magnolia Petroleum Co., supra at 229 (Brennan, J., concurring), by reference to a recent amendment to the Federal Tort Claims Act, 28 U.S.C. § 2680(h) and its counterpart, 28 U.S.C.

§ 2401(b).* The 1974 amendment allowed Bivens claims against the United States and thus made applicable the prescribed statutory two-year limitations period for the filing of administrative claims under 28 U.S.C. § 2401(b). See U.S. Code Cong. & Admin. News, 2789-91 (1974).

The amendment reflects the intention of Congress to adopt a uniform federal limitations period for Bivens claims against the United States rather than permitting case-by-case and state-by-state limitations periods to govern. While this period applies to the filing of administrative claims and is not a traditional statute of limitations period, it serves the same purpose of determining the period at which a plaintiff's claim will be considered too stale for adjudication. The Court should adopt a limitations period for individual federal officers which reflects Congress' express view of the appropriate limitations period for Bivens claims against the United States.

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* Section 2401(b) provides:

> "(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

POINT III

THE CONSTITUTION IS CLEARLY A STATUTE WITHIN THE MEANING OF CPLR § 214(2); THUS PLAINTIFF'S CLAIMS ARE NOT TIME-BARRED.

If the Court declines to fashion a special federal statute of limitations and continues to look to additional New York law for an appropriate limitations period, the Court should rely on the three-year period of CPLR § 214(2).* Plaintiff's claims arise directly from the Federal Constitution which is clearly a "statute" within the meaning of § 214(2).

The lower court's initial decision rejected this analysis, stating that "[a] Bivens action, founded as it is upon the Constitution, is not, except in the most expansive sense, 'created or imposed by statute'." (A-67) The Court elaborated on this point in its denial of plaintiff's motion to reargue by stating:

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* CPLR § 214(2) provides:

> "The following actions must be commenced within three years:
>
> . . .
>
> 2. An action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215; . . ."

> "The Court remains of opinion 1) that an action for money damages for violation of plaintiff's constitutional rights founded directly upon the Constitution, is not a liability created or imposed by statute which would bring CPLR § 214(1) into play." (A-87-88).

The lower court, in so stating, misread both the intent and purpose of CPLR § 214(2) and the nature of the Federal Constitution as a source of law.

The predecessor to the pertinent section of CPLR § 214(2) was CPA § 48(2), which provided a six-year period for an "action to recover upon a liability created by statute, except a penalty or forfeiture." In a series of cases interpreting this language, various courts in New York evolved a test of whether "a liability [was] created by statute." In Shepard Co. v. Taylor Publishing Co., 234 N.Y. 465, 468 (1923), the New York Court of Appeals interpreted that language as meaning "a liability which would not exist but for the statute." Accord, City of Buffalo v. Maggio, 21 N.Y.2d 1017 (1968); Bevelander v. Town of Islip, 10 A.D.2d 170 (2nd Dept. 1960); People v. Duggan, 30 A.D.2d 736 (3rd Dept. 1968); Bonilla v. Reeves, 49 Misc.2d 273 (N.Y.Co. 1966).

In Bevelander v. Town of Islip, supra at 172, the Court while reaffirming the Shepard interpretation added that "the test of whether a particular liability is one created by statute is to determine whether the liability is a governmental statutory denouncement of a human action heretofore undenounced." (Emphasis added).

In finding that the Constitution was not a statute under CPLR § 214(2), the Court relied on New York v. Cortelle Corp., 38 N.Y.2d 83 (1975). Upon analysis, Cortelle Corp. in fact supports plaintiff's position that CPLR § 214(2) is "applicable to actions for wrongs not recognized in the common or decisional law . . ." New York v. Cortelle Corp., supra at 86. The New York Court of Appeals held that an action commenced by the New York Attorney General was not barred by the three-year statute because it was not based on a "statute" but upon "rather old and common type of fraud." The Court held that the statutes relied on by the Attorney General in commencing the suit merely provided a procedural remedy to effectuate the pre-existing substantive right.

In contrast to Cortelle Corp., plaintiff's substantive right acrues directly from the Constitution, and the three-year statute applies. This conclusion is mandated since a Bivens claim arising under the Fourth Amendment is exactly that kind of action to which CPLR § 214(2) is applicable, viz., one which is not known at common law, which was created by legislative-type enactment, the Constitution, and which creates a new substantive right to bring the action.

In several cases arising under the Fourth Amendment, the Supreme Court has indicated that the Amendment, as one of its purposes, alters the common law and local law of searches and seizures, see Katz v. United States, 389 U.S.

347 (1967); Berger v. New York, 388 U.S. 41 (1967), thus serving the same function as a statute enacted to repeal or modify common law. Indeed, Section 1983, which the courts have recognized is the counterpart to a Fourth Amendment claim under Bivens, has been held to create "rights and [impose] obligations different from any which would exist at common law in the absence of statute." Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1971) (emphasis added).

However, the Fourth Amendment, although it altered the common law and created a new right of action, does not by its terms specify a remedy. In discussing this apparent anomaly, the Supreme Court in Bivens noted that:

> "Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well-settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' Bell v. Hood, 327 U.S., at 684 . . ." (403 U.S. at 396). (emphasis added).

Thus, the Supreme Court itself regarded the Fourth Amendment cause of action in the same way as a cause of action created by statute.

In addition, within the text of the Constitution and throughout the body of statutes enacted by Congress, Congress has considered the Constitution, laws and treaties of the

United States as one integrated federal body of law.* See, inter alia, Article VI of the U.S. Constitution; 28 U.S.C. § 1257(3); 28 U.S.C. § 1331(a); 28 U.S.C. § 1343(3); 28 U.S.C. § 1652; 42 U.S.C. § 1983.

Finally, logic dictates that the Constitution as a written body of laws promulgated by our Founding Fathers, upon which all other laws and treaties are based, should be treated as equivalent to a "statute" for purposes of determining a statute of limitations. To distinguish between the Constitution and other statutes because the Constitution has a special title while other statutes are lumped together in a Code for convenience sake is a problem of semantics only. Indeed, the Constitution is encompassed in the dictionary definition of the word "statute."** Surely it makes no sense

* It is a long-established principle of our judicial history that the Constitution and the statutes are treated on the same footing. For example, in the area of "statutory" construction the same rules of intepretation and sources of judicial information are used in the solution of constitutional questions as in the construction of statutes. See Anno., U.S.C.A. Constitutional Construction and Interpretation of the U.S. Constitution, p. 69.

** The definition of "statute" in Webster's New International Dictionary of the English Language (2nd Ed. 1946) states in pertinent part:

> "A law enacted by, or by the authority of, the supreme legislative branch of a government, esp. of a representative government; the written will of the legislature expressed with all the requisite form of legislation; - often used in distinction from the common, or unwritten, law . . ."

to treat a Constitutionally-created right as less important and with a shorter limitations period than a Congressionally-created right.

Therefore, the Constitution should be considered a "statute" within the meaning of CPLR § 214(2), and plaintiff's Bivens claims against the federal defendants should be reinstated.

POINT IV

ALTERNATIVELY, THE COURT SHOULD APPLY CPLR § 213(1) PROVIDING A SIX-YEAR LIMITATIONS PERIOD FOR ACTIONS FOR WHICH NO LIMITATION IS SPECIFICALLY PRESCRIBED

In the event the Court rejects the arguments urged above, the Court should find that no limitations period is specifically prescribed and adopt the New York six-year statute of limitations period under CPLR 213(1).*

In rejecting the New York intentional torts one-year statute, the lower court properly emphasized that the Supreme Court in Bivens recognized a sharp distinction between state common law torts such as false arrest and federally constitutionally protected rights. See also Glasscoe

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* CPLR 213(1) states in pertinent part:

"The following actions must be commenced within six years:

1. an action for which no limitation is specifically prescribed by law."

v. Howell, 431 F.2d 863 (8th Cir. 1971); Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962); Almond v. Kent, supra; Van Horn v. Lukhard, supra; Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). However, the lower court erred in not carrying this conclusion to a logical end by refusing to apply a general statute of limitations.

In Glasscoe v. Howell, supra, the Court also rejected outright the mechanical analogy between a §1983 claim and state torts of assault, battery, and false imprisonment. In so doing, the Court relied on the reasoning of the Ninth Circuit in Smith v. Cremins, supra, and Mr. Justice Harlan, concurring in Monroe v. Pape, supra:

> "Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability. As Mr. Justice Harlan recently suggested, 'a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right'" (Emphasis added). 431 F.2d at 865.

Accordingly, the Court in Glasscoe, rejected the one-year statute of limitations for state torts in favor of either a three-year contract statute of limitations or a five-year

general statute of limitations. See also Amen v. Crimmins, 379 F. Supp. 777 (N.D.Ill. 1974); Alliance to End Repression v. Rochford, 407 F. Supp. 115 (N.D.Ill. 1975); Morrow v. Igleburger, 67 F.R.D. 675 (S.D.Ohio 1974); Crawford v. Zeitler, 326 F.2d 119 (6th Cir. 1964); Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958); Contract Buyers League v. F&F Investment, 300 F. Supp. 210 (N.D.Ill. 1969), aff'd sub nom., Baker v. F & F Investment, 420 F.2d 1191 (7th Cir.), cert. denied, 400 U.S. 871 (1970); Lazard v. Boeing Company, 322 F.Supp. 343 (E.D.La. 1971).

Based on these authorities, since a Bivens action is the federal counterpart to a §1983 action, it would be entirely appropriate to apply the New York six-year general statute of limitations to the instant claims as the most analogous state limitations period.*

Furthermore, since the Supreme Court in Bivens prohibited no specific limitations period, and no New York statute prescribes a period specifically for an action based on deprivation of federal constitutional rights, the general statute of limitations, by its very terms, should govern. See Amen v. Crimmins, supra at 779; cf. Edgarton v. Puckett,

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* Though not raised below, it can be similarly argued that even the New York three year statute of limitations governing personal injury actions [an action to recover damages for a personal injury except as provided in Section 215] is more analogous than CPLR 215(1). See Almond v. Kent, supra; Edgarton v. Puckett, 391 F. Supp. 463 (W.D. Va. 1975); Gordon v. City of Warren, supra.

supra at 466 n. 3.

Accordingly, since plaintiff's claim would not be time-barred under CPLR § 213(1), the lower court's order should be reversed.

POINT V

THE COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR DEFAMATION OF CHARACTER AS BARRED BY THE ONE-YEAR NEW YORK STATUTE OF LIMITATIONS

The District Court held that plaintiff's claim for defamation, based primarily upon defendants' causing to be published certain newspaper articles on November 16, 1973, regarding plaintiff's arrest for armed robbery and the showing in a "rogues' gallery" of plaintiff's photograph taken in violation of his constitutional rights,* was barred by the one-year New York statute of limitations, CPLR § 215(3), under the single publication rule (A-71-72). Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119 (1948); Sorge v. Parade Publications, Inc., 20 A.D.2d 338 (1st Dept. 1964).

While plaintiff does not dispute that a New York defamation claim is subject to the one-year statute of limi-

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* Plaintiff alleges that as a result of such acts he suffered and continues to suffer great humiliation, embarrassment and physical and mental injury as well as loss of reputation among his business associates, friends and family (A-9).

tations, see Constant v. Kulukundis, 125 F. Supp. 305 (S.D. N.Y. 1954), it is abundantly clear that the single publication rule has no application here. In Gregoire v. G. P. Putnam's Sons, supra, the court found that a cause of action for libel accrued on the first date of the publication of an allegedly libelous book and not the date when subsequent copies of the same book were published and distributed after additional printings. Likewise, Sorge v. Parade Publications Inc., supra, relates to the alleged libel of one edition of a newspaper distributed throughout the country. In contrast, plaintiff's defamation claims are based on two or more wholly independent events: the publication of the newspaper articles and the showing of plaintiff's photograph to third parties. Therefore, the subsequent showing of the photograph cannot be compared with the distribution of identical copies of the book in Gregoire or the same edition of a newspaper in Sorge. Consequently, a separate cause of action for defamation arises directly from it.

In the lower court, plaintiff argued that both activities were part of a continuing wrong and thus the claim for defamation accrued on the date of each subsequent injury. See 509 Sixth Avenue Corp. v. New York City Transit Authority, 15 N.Y.2d 48 (1964); Kearney v. Atlantic Cement Co., 33 A.D.2d 848 (3rd Dept. 1969). Even assuming arguendo that plaintiff's claim as to the causing of the publication of the articles is

barred by the statute of limitations,* the one-year period certainly cannot bar the independent claim regarding the showing of plaintiff's photograph in the summer or fall of 1974 (A- 36), since such act occurred well within the one-year period prior to filing the complaint.**

The lower court also found that the showing of a photograph in a rogues' gallery is not defamatory. This is erroneous. Clearly, the publication in a rogues' gallery of the picture of a person who has not been convicted of a crime constitutes a gross invasion of privacy and injury to reputation. See Annot., Invasion of Privacy - Name or Likeness, 30 A.L.R. 3d 203 at 276 (1970).

Accordingly, plaintiff's claim for defamation was improperly dismissed and this Court should reverse and reinstate the claim.

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* If plaintiff sustained damage arising from the publication of the articles within one year prior to the filing of the complaint, his claim with respect to such publication is not time barred. Kearney v. Atlantic Cement Co., supra. Therefore, at the very least, the Court must remand for a factual hearing on this question.

** Plaintiff has alleged that his picture was shown to others at other times and places unknown to him (A-9). Only those incidents occurring prior to January 29, 1974, a year before the filing of the complaint, could arguably be considered time-barred. In any event, all of these incidents are evidence of plaintiff's constitutional claims and will be raised at trial even if they are not grounds for a separate claims of defamation.

POINT VI

THE COURT ERRED IN DISMISSING PLAINTIFF'S § 1985 CLAIM AGAINST THE FEDERAL DEFENDANTS FOR FAILURE TO ALLEGE A RACIAL OR CLASS-BASED DISCRIMINATORY ANIMUS

Plaintiff's Amended Complaint alleges a civil rights conspiracy by both federal and city defendants in violation of 42 U.S.C. § 1985(3)*, based on the acts of defendants surrounding plaintiff's unlawful arrest, interrogation, detention and the events which flowed therefrom.**

The Court dismissed plaintiff's § 1985 claim against the federal defendants for failure to allege a racial or class-based invidiously discriminatory animus as required by Griffin v. Breckenridge, 403 U.S. 88 (1971).

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* Title 42 U.S.C. § 1985(3) provides in pertinent part:

> "[I]f two or more persons conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

** Federal officials are clearly subject to the constraints of § 1985. Revis v. Laird, 391 F. Supp. 1135 (E.D.Cal. 1973).

Plaintiff does not contend that a racial animus is present, nor is such a requirement necessary. See Wakat v. Harlib, 253 F.2d 59 (7th Cir. 1958); Nugent v. Sheppard, 318 F. Supp. 314 (N.D.Ind. 1970); Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D.Pa. 1974). Rather plaintiff's arrest without probable cause had a cognizable class-based discriminatory animus similar to that in Wakat v. Harlib, supra.

The court in Wakat held that allegations that plaintiff's constitutional rights were violated by an allegedly false arrest and unlawful criminal prosecution, with no allegation of racial discrimination, stated a claim under § 1983 and § 1985. The Court stated:

> "Discrimination based upon a classification created by the police is as much within the condemnation of the civil rights acts as discrimination based on a classification derived from color, race or religion. As said in Griffin v. Illinois, 351 U.S. 12, 17, 76 S.Ct. 585, 589, 100 L.Ed. 891, '* * * [I]n this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.'" 253 F.2d at 64 (Emphasis in original).

In Wakat, the court found class-based discrimination on the ground that plaintiff had a prior arrest record. In the instant case, plaintiff also has a prior arrest, at an early age. However, plaintiff's preliminary discovery procedures have not yet established when the prior

arrest record was known to defendants. Furthermore, as was pointed out by plaintiff to the lower court, at a deposition of a city defendant, it was established that plaintiff was arrested with no effort to determine if he was working at the time of the robbery, as subsequent affidavits proved. (A-81-84). It was claimed that because of the type of job plaintiff had at JFK International Airport, plaintiff had, in the defendants' view, free time and "freedom to travel." Thus, no investigation was made and plaintiff was discriminatorily singled out for special and invidious treatment. This is the kind of conduct condemned in Griffin v. Breckenridge, supra.

Finally, in Nugent v. Sheppard, supra, the court upheld a complaint under § 1983 and § 1985 alleging that plaintiff was unlawfully beaten by police, with no allegation of racial or class discrimination.

It is clear, therefore, that plaintiff has stated a claim under § 1985.* Accordingly, the lower court's order dismissing plaintiff's § 1985 claim should be reversed.

CONCLUSION

For the foregoing reasons, the District Court's

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* Like claims arising under § 1983, this claim is not time-barred.

Order of August 2, 1976 should be reversed, and the Amended Complaint reinstated in full against the federal defendants.

Dated: New York, New York
October 29, 1976

Respectfully submitted,

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COPY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N.J. 07101

Chambers of
LEONARD I. GARTH
Judge

November 13, 1972

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Leavenworth, Kansas 66048

Miss Carolyn E. Arch, AUSA
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Re: Ralph M. Lepiscopo v. Federal Bureau of Investigation, et al.
Civil Action No. 1170-72

LETTER MEMORANDUM AND ORDER

This matter came on for hearing before the Court on November 13, 1972 on the submission of papers.

The plaintiff in this Civil Action has sought damages against both the Federal Bureau of Investigation and The Newark Police Department. His Civil Complaint was filed July 6, 1972 and is predicated upon an alleged illegal search and seizure which occurred on June 17, 1963.

On September 13, 1972 I granted a motion for a judgment on the pleadings made by The Newark Police Department. Now, the defendant Federal Bureau of Investigation has moved for summary judgment, asserting that plaintiff is met by the doctrine of collateral estoppel.

Whether or not the legality of the search and seizure was litigated in the prior Criminal Action in such form as to require the application of collateral estoppel in this action is doubtful, Williams v. Murdoch, 330 F.2d 745, 752 (3d Cir. 1964); See generally 1B Moore's Federal Practice ¶0.441-1.444, but I need not decide this issue in light of the resolution of the statute of limitations problem.

Even if I assume for these purposes that the search and seizure here was illegal, I hold that plaintiff's cause

EXHIBIT A

C O P Y

Mr. Ralph M Lepiscopo
Miss Carolyn E. Arch, AUSA
W. William Hodes, Esquire

November 13, 1972 - 2 -

of action under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) is barred by the statutes of limitations. Though the question has never been decided as to Bivens, I find McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (Brennan, concurring opinion) and 2 Moore ¶3.07(2) persuasive in arguing that where there is no readily identifiable statute of limitations for a federally created cause of action at law, we should analogize to similar causes of action for which there is a statute of limitations. I find the Bivens action very similar to action under 42 U.S.C. §1983, the relevant statute of limitations for which is that of the forum state. Butler v. Sinn, 423 F.2d 1116 (3d Cir. 1970). In New Jersey, the relevant statute of limitations has run. N.J.S.A. 2A:14-1. I therefore grant the motion of defendant Federal Bureau of Investigation.

For the reasons above set forth, it is on this 13th day of November, 1972

ORDERED, that the motion of the defendant Federal Bureau of Investigation be and the same is hereby granted and that summary judgment in favor of the defendant and against the plaintiff dismissing the complaint be and the same is hereby granted. No costs.

The original of this Memorandum Order has been filed with the Clerk of Court.

Very truly yours,

LEONARD I. GARTH
Judge, U.S. District Court

LIG:jer

Original Filed
Clerk, U.S.D.C.

COPY: 2/21/75
JCK:caj

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

JAMES F. REGAN, :

Plaintiff-Appellant, : Appeal Docket No. 76-6139

-against- :

JOSEPH F. SULLIVAN, et al., :

AFFIDAVIT OF SERVICE

Defendants-Appellees. :

and :

JOHN F. CALLAGHAN, et al., :

Defendants. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

IRIS CINQUEMANI, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 85 Columbia Street, New York, N.Y. 10002.

On October 29, 1976 deponent served two copies of the Brief of Plaintiff-Appellant and one copy of the Joint Appendix upon W. Bernard Richland, Corporation Counsel, Attention Saul Bernstein, attorney for Defendants Harkins and Greenwald in this

action at Municipal Building, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Iris Cinquemani

IRIS CINQUEMANI

Sworn to before me this

21st day of October, 1976.

Joan Ross Sorkin

Notary Public

JOAN ROSS SORKIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4511037
Qualified in New York County
Term Expires March 30, 1977

Sent 2 Copies
Scott Cooper

Paula
Jones